STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2014
v	No. 315395 Wayne Circuit Court
DANIEL WILLIAM QUINLAN, Defendant-Appellant.	LC No. 11-012621-FC

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of second-degree criminal sexual conduct (CSC) (person under 13, defendant 17 years or more), MCL 750.520c(1)(a). He was sentenced to 57 months to 15 years' imprisonment for two of the second-degree CSC convictions and five years' probation for the third second-degree CSC conviction, to be served concurrently. We affirm.

Defendant's conviction arose from sexual contact with his four-year-old daughter. On October 6, 2011, an anonymous source contacted Child Protective Services (CPS) based on a report by the complainant that defendant had licked her private part and it was gross. After the report, the complainant was interviewed at her school and taken to a hospital for examination. The complainant was interviewed at Kids Talk a few weeks later, and by a doctor. The complainant told the doctor that defendant had licked her "wiener," which was the name she used for her genital area. The complainant said she had kissed defendant's wiener, and that defendant had touched her butt and genitals with his wiener. A representative from CPS spoke to defendant, and defendant stated that on two occasions that he had inadvertently penetrated the complainant's vagina with his finger while cleaning the complainant. He also stated that the complainant had kissed his penis twice in the bathroom right after he finished urinating. Defendant stated that he told the complainant not to do that again. Defendant was also interviewed by police. He stated that he had brushed his tongue against the complainant's clitoris and joked, "That's delicious." Defendant denied that his penis ever entered the complainant's vagina. He described an incident where the naked complainant sat on his lap. Defendant was only wearing a towel, and the complainant was rubbing against his penis, which was erect. Defendant was subsequently charged and the case proceeded to trial, where the complainant testified. She stated that defendant had kissed her genital area a couple of times, which she said was "5 or 15 or 20." The complainant testified that she had kissed defendant's

penis. Defendant told the complainant these incidents were a secret. The complainant was unable to identify defendant at trial. Expert witnesses for the prosecution and defendant testified at trial, among other witnesses. After a lengthy jury deliberation, defendant was convicted of three counts of second-degree CSC.

Defendant argues that prosecutorial misconduct denied him a fair trial. We disagree.

To preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010); *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Defendant alleges that the prosecutor committed misconduct on several occasions. He objected to some of these issues, but not all. Therefore, some are preserved and some are not.

Generally, this Court reviews claims of prosecutorial misconduct de novo "to determine whether the defendant was denied a fair trial." *People v Dunigan*, 299 Mich App 579, 588; 831 NW2d 243 (2013). When a claim of prosecutorial misconduct is not preserved, this Court reviews for plain error affecting substantial rights. *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Meissner*, 294 Mich App 438, 455; 812 NW2d 37 (2011). In addition, reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Bennett*, 290 Mich App at 476.

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Claims of prosecutorial misconduct are reviewed case by case, "and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64. "[P]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010). They have discretion over "how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *Meissner*, 294 Mich App at 456.

First, defendant asserts that the prosecutor committed misconduct by asking expert witness Dr. Lisa Markman's opinion on whether the complainant had been groomed.[1] Defendant contends that the questions asked by the prosecution violated a pretrial order in which the court prohibited the prosecution from asking Dr. Markman if she thought the complainant had been sexually abused. At trial, the prosecutor first asked Dr. Markman, "[w]ould [the complainant]'s recitation to you of what happened and her attitude and demeanor and the giggling, [sic] consistent with a child who had been groomed?" Defendant objected that the question called for speculation, which was overruled. Dr. Markman responded, "[i]n my opinion, yes." Next, the

[1] Dr. Markman explained that grooming refers to a situation where an adult or older child "basically train[s] a child for sexual abuse or inappropriate behavior." The adult may transition from close hugging and kissing to improper touching and or other behavior.

prosecutor asked, "[s]o you think [the complainant] had been groomed to accept this behavior and not to see it as a bad thing, and not to be ashamed of it?" Defendant objected that the question essentially asked the witness to give her opinion on the veracity of the complainant. The court sustained the objection and instructed the jury to "disregard any testimony relative to [the complainant] being groomed."

This questioning by the prosecution did not constitute prosecutorial misconduct. The first question to Dr. Markman did not violate the court's pretrial order because it did not elicit Dr. Markman's opinion of whether the complainant had been sexually abused. Rather, it addressed whether the complainant's demeanor and giggling was consistent with that of a child who had been groomed. In addition, defendant's objection was that the question called for speculation, not that it violated the court's pretrial order. Moreover, even though the question called for speculation, or an opinion, it was not improper because Dr. Markman was an expert witness. See MRE 702; *People v Yost*, 278 Mich App 341, 393-395; 749 NW2d 753 (2008). MRE 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion." The prosecutor's next question, regarding whether Dr. Markman thought the complainant had been groomed, also did not deny defendant a fair trial because it was not answered. Finally, this line of questioning did not prejudice defendant because the court instructed the jury to "disregard any testimony relative to [the complainant] being groomed." Reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Bennett*, 290 Mich App at 476. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

Second, Defendant claims that he was denied a fair trial because the prosecutor disparaged his expert witness, calling the research he relied on "psycho babble." Defendant did not object to the prosecutor's statement, so this issue is reserved for plain error. See *Gibbs*, 299 Mich App at 482. During her closing argument, the prosecutor said:

> The defense called [Dr. Ira Schaer] to talk to you about the cycle babel (phonetic)[2] research that's out there that discredits children who alleged sexual abuse. Well, this doctor had no hard facts about this case. [Footnote added.]

The prosecution calling the research Dr. Schaer relied on "psycho babble" does not constitute prosecutorial misconduct. The prosecutor was not referring to Dr. Schaer or his opinions. Rather, she was referencing the research upon which Dr. Schaer relied. While a prosecutor "may not suggest that defense counsel is intentionally attempting to mislead the jury," prosecutors are able to argue the evidence and reasonable inferences arising therefrom. *Unger*, 278 Mich App at 236. Further, prosecutors are not limited to presenting their arguments in the blandest terms possible and are "afforded great latitude regarding their argument and conduct at trial." *Id*. at 236, 239. In addition, the trial court instructed the jurors to consider only the evidence when reaching their verdict. The court specifically told the jury that the attorneys'

[2] Defendant claims that the prosecutor said "psycho babble research," while the prosecution suggests that she said, "psychological research."

statements are not evidence. These instructions cured any errors. See *Mesik*, 285 Mich App at 542.

Third, defendant contends that the prosecutor played to the jury's sympathy by discussing the psychological effect defendant's behavior would have on the complainant in the future. The prosecutor argued:

> She's [the complainant] not mature enough or sophisticated enough to know that what he did to her could mess her up psychologically for the rest of her life. She doesn't know that when she's a teenage[r] and gets a boyfriend that she may freak out the first time he tries to touch her. She doesn't know those things. And she has no anger toward him, not hatred.

It is improper for the prosecutor to ask the jury to sympathize with the victim. See *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003); *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, reversal is not required when such a statement is isolated, "not so inflammatory as to prejudice defendant," and the jury is told to be uninfluenced by sympathy or prejudice. *Watson*, 245 Mich App at 591-592. The prosecutor's statement in this case was isolated. While the statement may have improperly induced the jurors to sympathize with the complainant, the jurors were also specifically instructed that they should not allow sympathy or prejudice to influence their decision. They were also told that the lawyer's statements are not evidence. Consequently, reversal is not required. See *id.*; see also *Akins*, 259 Mich App at 563 n 16.

Fourth, Defendant argues that the prosecutor improperly vouched for the complainant's credibility by saying that the complainant had no reason to lie. The prosecutor said, "[s]o clearly [the complainant] has no motive to lie, nor is she sophisticated enough or mature enough to carry out a lie like this." Defendant did not object to this statement, so his argument is reviewed for plain error. See *Gibbs*, 299 Mich App at 482. It is improper for a prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Meissner*, 294 Mich App at 456. However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). In this case, the prosecutor did not make any references to her personal knowledge or beliefs. Rather, the prosecutor asserted that the complainant had no reason to lie. Furthermore, the jury was instructed that the attorneys' statements were not evidence. Defendant has not shown plain error affecting his substantial rights. See *Gibbs*, 299 Mich App at 482.

Finally, defendant alleges that the prosecution referenced testimony that was not in evidence. It is improper for a prosecutor to refer to facts that are not in the record. *Meissner*, 294 Mich App at 457. During her closing argument, the prosecutor quoted a statement that defendant made at the end of his interview with police — "I'm a bad person and I'm going to jail." Defendant objected and the court sustained defendant's objection. It is unclear from the record whether this statement in the interview was played for the jury because the interview was not transcribed into the record, and parts of the interview were redacted. Specifically, the court redacted references to a polygraph test as well as a story about defendant masturbating. A

review of the interview reveals that defendant stated he was thinking he was a bad person and he was going to prison. These statements were not made in connection with either of the redacted topics from the interview. In addition, the police officer was cross-examined regarding the portion of the interview that contained the statements referenced by the prosecutor, which supports a finding that the statements were played for the jury. Specifically, the police officer testified that defendant was thinking he would go to prison. In the interview, this statement was made a few seconds after defendant said he was a bad person. Moreover, the officer testified that defendant made other statements that reflected similar sentiments during the interview. For these reasons, we hold that the statements referenced by the prosecutor were likely admitted at trial, and, at a minimum, the statements made by the prosecutor were supported by the officer's testimony. A prosecutor may base her arguments on the facts admitted at trial, along with "reasonable inferences arising therefrom." *Id*. at 456. Because the prosecutor's argument was supported by the evidence, it was not improper. Defendant has not shown that the prosecutor's statement denied him a fair trial.

Defendant next argues that his trial counsel was ineffective for failing to exercise a peremptory challenge on a juror who said during voir dire that he was a victim of sexual abuse. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must make a motion for a new trial or an evidentiary hearing with the trial court. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Defendant moved for a *Ginther*[3] hearing in this Court, but his motion was denied. *People v Quinlan*, unpublished order of the Court of Appeals, entered March 5, 2014 (Docket No. 315395). When an ineffective assistance of counsel claim is unpreserved, "this Court's review is limited to mistakes apparent from the record." *Heft*, 299 Mich App at 80. We review "findings of fact for clear error and questions of law de novo." *Id*.

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, AM VI; Const 1963, art 1, § 20. "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207. It is presumed that trial counsel used effective trial strategy, and a defendant has a heavy burden to overcome this presumption. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). This Court "will not substitute [its own] judgment for that of counsel on matters of trial strategy," nor will it "use the benefit of hindsight when assessing counsel's competence." *Id*.

Jury selection is a matter of trial strategy, and defendant has not overcome the heavy presumption that his trial counsel used effective trial strategy. See *id.*; *Unger*, 278 Mich App at

[3] See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

258. A trial attorney has the opportunity to view "a potential juror's facial expressions, body language, and manner of answering questions," which are possibly the most important criteria in jury selection. *Unger*, 278 Mich App at 258. Choosing a jury based on observations and hunches may be as valid as any other method of jury selection. *Id*; see also *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). Because this Court "cannot see the jurors or listen to their answers to voir dire questions," it "has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror." *Unger*, 278 Mich App at 258 (internal citations omitted).

The juror at issue promised that he "could most definitely be fair." The jurors all swore "to try the case justly and to reach a true verdict." Because this Court will not substitute its own judgment for that of trial counsel on matters of trial strategy, nor "use the benefit of hindsight when assessing counsel's competence," we conclude that trial counsel was not ineffective for failing to use a peremptory challenge on the juror who was a victim of sexual abuse. *Payne*, 285 Mich App at 190.

In addition, defendant cannot show he was prejudiced by counsel's alleged error. There is no evidence that the juror's prior experience with sexual abuse affected the verdict. As discussed above, the juror promised to be fair and swore, with the other jurors, to try the case justly. The jury was reminded of that oath before it began deliberating. The jurors were instructed that they must not let sympathy or prejudice influence their decisions. Furthermore, there was ample evidence to support defendant's convictions. Even if trial counsel erred by not using a peremptory challenge on the juror, it is not probable that this error affected the outcome of the proceedings. See *Nix*, 301 Mich App at 207.

Finally, defendant argues that judicial bias denied him a fair trial. We disagree.

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defendant did not object when the trial judge made the comment at issue. Therefore, this issue is unpreserved. This Court reviews unpreserved constitutional errors for plain error affecting substantial rights. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012).

A defendant has the right to a fair and impartial trial under both the United States and Michigan Constitutions. See US Const, Am VI; Const 1963, art 1, § 20. This right is violated when the trial court's conduct "pierces the veil of judicial impartiality." *People v Conley*, 270 Mich App 301, 307-308; 715 NW2d 377 (2006). Although a trial judge has significant discretion and power with respect to trial proceedings, this power is limited. *Id*. The trial court's conduct has pierced the veil of judicial impartiality, thus requiring reversal of the defendant's convictions, when "the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *Id.* at 308, quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975).

The comment at issue was made to explain the court's decision to overrule an evidentiary objection made by defendant. The court, on behalf of a juror, asked a testifying police officer if the complainant referred to her "private part" as a vagina during their conversation at her school.

The officer said no. The prosecutor followed up by asking what the complainant did call it, which is when defense counsel objected. The court overruled the objection and the officer testified that the complainant called it her "pee pee." The parties had no further questions for the witness, and the court then said:

> And just so the record reflects, the reason for my allowance of that and overruling the objection is that this would have – this conference with [the complainant] would have been almost immediate to any impropriety having been brought to the attention of the authorities, and when we're talking about a child of only four years of age or five years of age, the statement can have some trustworthiness associated with it.

Defendant argues that this statement was improper because the trial court vouched for the complainant's credibility and, thus, showed bias in favor of a guilty verdict.

Defendant has not shown that the judge's statement constituted plain error affecting his substantial rights. See *King*, 297 Mich App at 472. A trial judge has significant discretion and power over trial proceedings. *Conley*, 270 Mich App at 307. This includes the power to rule on evidentiary objections. See MRE 104. In fact, a trial court must decide "preliminary questions concerning . . . the admissibility of evidence." MRE 104.

In addition, the trial judge's comment was made in isolation. The judge did not indicate that he found the accusations against defendant to be true, or that he believed the complainant's testimony. Rather, the trial judge allowed the police officer to relate what the complainant called her genital area because the officer was one of the first people she spoke to after the allegations arose. Additionally, the court specifically instructed the jurors:

> [W]hen I make a comment, or give an instruction, I am not trying to influence your vote, or express a personal opinion about the case.
>
> If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion.
>
> You are the only judges of the facts, and you should decide this case from the evidence.

This instruction cured any error caused by the judge's comment because jurors are presumed to follow their instructions. See *Mesik*, 285 Mich App at 542.

Affirmed.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood